Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

DONALD VENTETOULO, ACTING DIRECTOR,
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

FRED DEWITT,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR WRIT OF CERTIORARI

JEFFREY B. PINE
Attorney General of the
State of Rhode Island

ANNIE GOLDBERG*
Assistant Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400
Attorneys for Petitioner

*Attorney of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

WHERE A STATE TRIAL JUDGE HAS REDUCED A SENTENCE IN VIOLATION OF STATE LAW, AND WHERE THE ILLEGAL REDUCTION IS LATER CORRECTED PURSUANT TO A STATE PROCEDURAL RULE PERMITTING CORRECTION OF AN ILLEGAL SENTENCE "AT ANY TIME," DID THE UNITED STATES COURT OF APPEALS OF THE FIRST CIRCUIT ERR IN GRANTING RELIEF PURSUANT TO 28 U.S.C. § 2254 BASED UPON THE CONCLUSION THAT THE STATE PRISONER HAD ACQUIRED A "DUE PROCESS" RIGHT IN HIS ILLEGALLY REDUCED SENTENCE?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

INDEX OF AUTHORITIES CITED..... iii

CITATION TO OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE..... 3

ARGUMENT 7

A. THE DUE PROCESS RULE ANNOUNCED BY THE FIRST CIRCUIT HAS NO BASIS IN LAW AND REPRESENTS SUCH A DEPARTMENT FROM ESTABLISHED PRINCIPLES GOVERNING CORRECTION OF VOID OR ILLEGAL SENTENCES AS TO CALL FOR REVIEW. ... 9

B. IN OVERTURNING THE IMPOSITION OF A LEGAL STATE SENTENCE THE COURT OF APPEALS HAS TRANSGRESSED THE BOUNDS OF PROPER JURISDICTION UNDER § 2254..... 18

CONCLUSION 21

INDEX OF AUTHORITIES CITED

Page

CONSTITUTIONS, STATUTES, AND RULES:

18 U.S.C. § 3576 19
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1257 1
28 U.S.C. § 2254 ..... 1, 4, 5, 18, 19, 22
Fed. R. Crim. P. 35 ..... 3, 11, 20
R.I. Gen. Laws § 12-19-10 ..... 3, 4
R.I. Gen. Laws § 13-8-9 5
R.I. Gen. Laws § 13-8-13 5
R.I. Super. R. Crim. P. 32 (f) 5
R.I. Super. R. Crim. P. 35 ..... 2, 4, 11
U.S. CONST. amend. XIV, 1 ..... 2, 14
Sup. Ct. R. 10.1 (a) 1, 9
Sup. Ct. R. 10.1 (c) 1

UNITED STATES SUPREME COURT CASES:

Andrews v. United States, 373 U.S. 334 (1963) 11
Bozza v. United States, 330 U.S. 160 (1946) 10
Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710 (1993) 18
Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475 (1991) 19
Marshall v. Lonberger, 459 U.S. 422 (1983) 18
Missouri v. Hunter, 459 U.S. 359 (1983) 21
Snyder v. Massachusetts, 291 U.S. 97 (1934) 18
United States v. DiFrancesco, 449 U.S. 117 (1980) ..19, 20

INDEX OF AUTHORITIES CITED – Continued

Page

UNITED STATES COURTS OF APPEALS CASES:

Breest v. Helgemoe, 579 F.2d 95, 101 (1st Cir.), *cert. denied*, 439 U.S. 933 (1978) 7, 10, 13, 17

Burns v. United States, 552 F.2d 828 (8th Cir. 1977) 11

DeWitt v. Ventetoulo, 6 F.3d 32 (1st Cir. 1993) ... 1, 7, 13

Laycock v. State of New Mexico, 880 F.2d 1184 (10th Cir. 1989) 12

Llerena v. United States, 508 F.2d 78 (5th Cir. 1975) 11

McNutt v. Schneckloth, 421 F.2d 128 (9th Cir. 1957) 12

Safrit v. Garrison, 623 F.2d 330 (4th Cir. 1980) 11

Shields v. Beto, 370 F.2d 1003 (5th Cir. 1967) .. 14, 15, 16

Thompson v. United States, 495 F.2d 1304 (1st Cir. 1974) 10

United States v. Adair, 826 F.2d 1040 (11th Cir. 1987) 12

United States v. Ames, 743 F.2d 46, 47 (1st Cir. 1984) *cert. denied*, 469 U.S. 1165 (1985) 12

United States v. Arrellano-Rios, 799 F.2d 520 (9th Cir. 1986) 14

United States v. Becker, 536 F.2d 471 (1st Cir. 1976) 12

United States v. Bentley, 850 F.2d 327 (7th Cir.) *cert. denied*, 488 U.S. 970 (1988) 11

United States v. Bynoe, 562 F.2d 126 (1st Cir. 1977) 12

INDEX OF AUTHORITIES CITED – Continued

Page

United States v. Crawford, 769 F.2d 253 (5th Cir. 1985) 20

United States v. De Los Santos-Himitola, 924 F.2d 380 (1st Cir. 1991) 12

United States v. Fogel, 829 F.2d 77 (D.C. Cir. 1987) 12

United States v. Guevremont, 829 F.2d 423 (3d Cir. 1987) 11, 20

United States v. Lewis, 862 F.2d 748 (9th Cir. 1988) *cert. denied*, 489 U.S. 1032 (1989) 12

United States v. Lundien, 769 F.2d 981 (4th Cir. 1985) 13

United States v. Ortega, 859 F.2d 327 (5th Cir. 1988) 13

United States v. Rico, 902 F.2d 1065 (2d Cir. 1990) *cert. denied*, 498 U.S. 943 (1990) 11, 13

United States v. Villano, 816 F.2d 1448 (10th Cir. 1987) 14

United States v. Welty, 426 F.2d 615 (3d Cir. 1970) 11

UNITED STATES DISTRICT COURT CASES:

Clifton v. Beto, 298 F.Supp. 1384 (D.Tex. 1968) 16

DeWitt v. Ventetoulo, 803 F.Supp. 580 (D.R.I. 1992) 1, 7, 14

Lanier v. Williams, 361 F.Supp. 944 (D.N.C. 1973) 15

Sterling v. Maggio, 505 F.Supp. 1111 (D.La. 1981) 16

United States ex. rel. Hanrahan v. Bosse, 547 F.Supp. 718 (D.Ill. 1982) 21

INDEX OF AUTHORITIES CITED – Continued

Page

RHODE ISLAND CASES:

State v. DeWitt, 423 A.2d 828 (R.I. 1980)..... 4

State v. DeWitt, 557 A.2d 845 (R.I. 1989).....1, 6

State v. O'Rourke, 463 A.2d 1328 (R.I. 1983). .4, 5, 11, 13

OTHER STATE CASES:

Bonner v. Brock, 610 P.2d 265 (Okl.Cr. 1980) 15

People v. Cavelli, 50 N.Y.2d 919, 431 N.Y.S.2d 450, 409 N.E.2d 924 (1980) 16

State v. Acuna, 103 N.M. 279, 705 P.2d 685 (1985) 14

State v. Breest, 116 N.H. 734, 367 A.2d 1320 (1976) ...7, 8

State v. Delmondo, 67 Haw. 531, 696 P.2d 344 (1985) 14

State v. Sheehy, 115 N.H. 175, 337 A.2d 348 (1975) 17

OTHER AUTHORITIES CITED:

28 A.L.R. 4th (1984 & Supp.) 12

Now comes Donald Ventetuolo,[1] Former Acting Director of the Rhode Island Department of Corrections [hereinafter referred to as the State], by his attorneys, and prays that this Honorable Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit entered October 6, 1993.

CITATION TO OPINIONS BELOW

The decision of a three-judge panel of the Court of Appeals is reported as *DeWitt v. Ventetoulo*, 6 F.3d 32 (1st Cir. 1993), reproduced as Appendix A. The opinion of the District Court for the District of Rhode Island is reported as *DeWitt v. Ventetoulo*, 803 F.Supp. 580 (D.R.I. 1992). The opinion of the Supreme Court of Rhode Island is found in *State v. DeWitt*, 557 A.2d 845 (R.I. 1989).

JURISDICTION

The judgment of the United States Court of Appeals entered on October 6, 1993. A petition for Rehearing and Suggestion for Reconsideration En Banc was denied November 22, 1993. The Order Denying Petition is reproduced as Appendix B. Jurisdiction is invoked under 28 U.S.C. §§ 1254(1), 1257, and 2254, and Sup. Ct. R. 10.1 (a) and (c).

[1] The correct spelling of the surname. The caption and citations retain the spelling maintained by the courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional issue in this case was decided under the Due Process clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The constitutional application of a state procedural rule is called into question, **R.I. Super. R. Crim. P. 35**:

> The court may correct an illegal sentence at any time. The court may correct a sentence imposed in an illegal manner and it may reduce any sentence within one hundred twenty (120) days after the sentence is imposed, or within one hundred twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred twenty (120) days after receipt by the court of a mandate or order of the Supreme Court of the United States issued upon affirmance of the judgment, dismissal of the appeal, or denial of a writ of certiorari. Within twenty (20) days after the filing of a motion to reduce a sentence, the attorney general may file a motion for an increase in said sentence. The court on its own motion, after the filing of a motion to reduce a sentence, may increase said sentence. The court may reduce a sentence, the execution

> of which has been suspended, upon revocation of probation.

Also involved is a Rhode Island Statute, **R.I. Gen. Laws § 12-19-10**:

> Imprisonment pursuant to a sentence, once commenced, shall not be subject to suspension by the superior court.

STATEMENT OF THE CASE

This case presents a decision apparently in conflict with decisions of other United States courts of appeals and other state courts, on a question not heretofore directly addressed by this Honorable Court: whether correction of an illegal sentence under a state procedural rule providing, like former Federal Rule 35,[2] for the correction of such "at any time" may violate due process if the prisoner has already attained his liberty.

The decision of the Court of Appeals for the First Circuit, answering the question affirmatively, not only declares the State's rule in effect unconstitutional, but in granting relief, negates a sentence upheld by the Supreme Court of Rhode Island and orders the release of a state prisoner according to an estimate of due process never before recognized by this Court, and in seeming conflict

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[2] Until its revision in 1985, Fed. R. Crim. P. 35 provided in pertinent part: "The court may correct an illegal sentence *at any time* and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." [Emphasis added.]

with decisions of this Court in cases arising under 28 U.S.C. § 2254.

Frederick DeWitt is a state prisoner sentenced originally to life imprisonment and concurrent lesser terms for robbery, arson, and assault with intent to murder. The convictions were affirmed on direct appeal, *State v. DeWitt*, 423 A.2d 828 (R.I. 1980), and thereafter, DeWitt moved for reduction of his sentence under Rule 35 of the Rhode Island Rules of Criminal Procedure. The motion was granted in 1981 and the sentence was reduced by suspending all but fifteen years of the life sentence, with twenty years' probation to commence upon release.

DeWitt was by then already serving his sentences, however; and according to Rhode Island statute, **R.I. Gen. Laws § 12-19-10,** "[i]mprisonment pursuant to a sentence, once commenced," is "not . . . subject to suspension by the superior court."

The Rhode Island Rules of Criminal Procedure were adopted after enactment of the statute. That the statutory prohibition would be taken to limit the power of the court under Rule 35 was not established until the Supreme Court of Rhode Island decided *State v. O'Rourke*, 463 A.2d 1328 (R.I. 1983), two years after the reduction of sentence in this case. With *O'Rourke*, the court held that Rule 35 had no effect on the statute's meaning or application and that § 12-19-10 imposed a restriction "which, by its plain language, *absolutely prohibits* suspension of a sentence of imprisonment once it is commenced." *Id.* at 1331 [emphasis added]. Attempt to reduce O'Rourke's sentence by suspending half was "invalid because, pursuant to § 12-19-10, the trial justice *lacked the authority* to

suspend any part of defendant's sentence once he began serving the period of imprisonment." *Id.* at 1332 [emphasis added]. The court ordered the ruling reducing O'Rourke's sentence vacated as "null and void" and directed that the original sentence be "reinstated with credit for time already served." *Id.*

O'Rourke's effect was not widely realized, and DeWitt continued to be viewed by the Parole Board and correctional staff as eligible for parole on his reduced fifteen-year sentence, not the original life sentence.[3] According to this estimate DeWitt became eligible for parole in August 1985, but the Parole Board denied his first application. One year later, in September 1986, a majority of the board voted for parole with release date in January 1987. DeWitt was released January 16, 1987, and was rearrested July 20 of the same year.

On information submitted in the criminal complaints against DeWitt in the circumstances leading to his arrest, the Rhode Island Attorney General filed a notice of intent under state procedural rules to present DeWitt as a violator of the terms of his probation and to revoke his suspended sentence.[4] That action was withdrawn when it

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[3] R.I. GEN. LAWS § 13-8-9 provides for parole of "any prisoner whose sentence is subject to its control, unless such prisoner be sentenced to imprisonment for life, and unless such prisoner be confined as an habitual criminal" once he has served "not less than one-third of the term for which he was sentenced." R.I. GEN. LAWS § 13-8-13 provides for parole eligibility on a life sentence after ten years.

[4] R.I. Super. R. Crim. P. 32 (f) provides: " the court shall not revoke probation or revoke a suspension of sentence or impose a sentence previously deferred except after a hearing at which

was realized the suspension was invalid under *O'Rourke*. The State then moved to correct the illegal sentence. The motion was granted. DeWitt appealed to the Supreme Court, claiming among other points that it was "fundamentally unfair" to allow his early freedom, "only to have it taken away due to a misconception which was nobody's fault," and arguing that the mistake should have been discovered and rectified sooner, or else allowed to stand, because by then he had developed an "expectation in the finality of that sentence," valid or not.

The Supreme Court of Rhode Island rejected those arguments, but remanded the case for reconsideration of the Rule 35 motion to reduce the life sentence by lawful means. *State v. DeWitt*, 557 A.2d 845 (R.I. 1989). The sentencing justice refused to reduce the life sentence. No appeal was taken from that decision.

Some twenty months later, DeWitt filed a *pro se* petition in the United States District Court for the District of Rhode Island, seeking habeas corpus relief under 28 U.S.C. § 2254. The District Court initially dismissed the petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, and a certificate of probable cause to appeal was denied February 5, 1991. The Court of Appeals for the First Circuit reversed and remanded the case March 14, 1991. The District Court

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the defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing. Prior to the hearing the State shall furnish the defendant and the court with a written statement specifying the grounds upon which action is sought under this subdivision."

directed the Attorney General of Rhode Island to answer as designated party respondent. A hearing was conducted in May 1992, and the petition was granted October 20, 1992. *DeWitt v. Ventetoulo*, 803 F. Supp. 580 (D.R.I. 1992). The State appealed. The Court of Appeals affirmed. *DeWitt v. Ventetoulo*, 6 F.3d 32 (1st Cir. 1993). A petition for rehearing and for hearing en banc was denied November 22, 1993. App. A. Mandate issued on November 30, 1993.

ARGUMENT

With this case the First Circuit declares as a rule, what at first it merely mused in *Breest v. Helgemoe*, 579 F.2d 95, 101 (1st Cir.), *cert. denied*, 439 U.S. 933 (1978), that

> After a substantial period of time, . . . it might be fundamentally unfair, and thus violative of due process for a court to alter even an illegal sentence in a way which frustrates a prisoner's expectations. . . .

Breest involved a state defendant sentenced to life imprisonment without certification by the court that the murder was psycho-sexual in nature, which under state law carried a mandatory minimum term of forty years; his minimum sentence as pronounced would have made him parole-eligible after eighteen. *State v. Breest*, 116 N.H. 734, 753, 367 A.2d 1320, 1335 (1976). The error was discovered within days and the sentence was corrected with certification some three weeks later on motion of the State. *Id.* Breest attacked the resentencing unsuccessfully on appeal, *Id.* at 753-54, 367 A.2d at 1335-36, and then

sought federal habeas corpus relief, 579 F.2d at 97. The District Court ruled that application of the enhancement statute "violated neither the double jeopardy nor the ex post facto clauses" but that due process required a hearing to establish that the murder was in fact psycho-sexual in nature, a ruling the State did not contest. *Id.* at 97-98. The Court of Appeals affirmed, agreeing that the sentence as pronounced was statutorily invalid, *id.* at 99, even though Breest "could have been lawfully imprisoned under a life sentence imposed without reference to" the statute, because the law imposed a duty to determine whether the crime was psycho-sexual "and if it was, to so certify." *Id.* at 99-100. The omission "left the sentence incomplete and . . . potentially more lenient than the statute permitted." *Id.* [footnote omitted].

Although nothing more was required to decide the case, the First Circuit undertook "[b]efore leaving this question" to remark its "*concern that the power of a sentencing court* to correct even a statutorily invalid sentence *must be subject to some temporal limit.*" *Id.* at 101. [Emphasis added.] It found it "need not decide, however, how long or under what circumstances" a State or sentencing court "constitutionally can wait to enhance an invalid sentence", as it found the "short period of time involved" there clearly "permissible." *Id.*

The First Circuit apparently believes it has answered here, the question it reserved in *Breest* – even though in this case, the original sentence was neither invalid nor enhanced, but merely reinstated, upon vacatur of a subsequent sentence reduced without authority.

A. THE DUE PROCESS RULE ANNOUNCED BY THE FIRST CIRCUIT HAS NO BASIS IN LAW AND REPRESENTS SUCH A DEPARTURE FROM ESTABLISHED PRINCIPLES GOVERNING CORRECTION OF VOID OR ILLEGAL SENTENCES AS TO CALL FOR REVIEW.

Review on Petition for a writ of certiorari will be granted "only when there are special and important reasons therefor", as when a United States court of appeals has rendered a decision in conflict with that of another on the same matter, or has decided a federal question in a way in conflict with a state court of last resort, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 10.1 (a).

The decision of the United States Court of Appeals for the First Circuit granting habeas corpus relief in this case not only directly overrules a decision of the Supreme Court of Rhode Island in a matter involving application of its own procedural rule to correct a void sentence, but is in conflict as well with its own prior decisions and those of other United States courts of appeals and other state courts of last resort respecting the correction of illegal sentences. The court bases this decision on an announced standard of due process which it concedes "cannot be calibrated precisely," 6 F.3d at 36, "drawing on considerations mentioned by cases like *Breest* and suggested by common sense," *Id.* at 35, which find no basis in any other decision of a court of law. The result requires Rhode Island to release its prisoner based on an illegal sentence.

A void sentence is recognized to be of no legal effect and to require correction. In *Bozza v. United States*, 330 U.S. 160 (1946), amendment of a sentence to add "minimum mandatory fines and penalties" required by statute in addition to imprisonment was attacked as constituting "double jeopardy forbidden by the Federal Constitution." *Id.* at 165-66. This Court rejected the contention, observing, "It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside", "at least during the term of court in which the invalid sentence was imposed", "even though the prisoner had already served part of his term[.]" *Id.* at 166. Declared the Court: "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Id.* at 166-67.

The First Circuit interpreted *Bozza* in *Thompson v. United States*, 495 F.2d 1304, 1306 (1974), as follows:

> The full import of *Bozza* is that a trial court not only *can* alter a statutorily-invalid sentence in a way which might increase its severity, but *must* do so when that statute so provides. [Emphasis by court.]

Likewise, in *Breest*, the Court repeated its understanding that *Bozza* "stands for the proposition" stated in *Thompson*, adding:

> Even after the defendant has commenced to serve his sentence, that power and that obligation continue.

579 F.2d at 99.

Rule 35 of the Federal Rules of Criminal Procedure was adopted to abolish the "term rule" at common law that left a court "in general without power to set aside or modify its criminal judgment after the expiration of the term at which it was entered." *United States v. Welty*, 426 F.2d 615, 617 & nn.8 & 9 (3d Cir. 1970) (citing *United States v. Mayer*, 235 U.S. 55, 67-69 (1914), and *Heflin v. United States*, 358 U.S. 415, 421 (1959) (Stewart, J., concurring)). Until its revision in 1985, Rule 35 "provide[d] in pertinent part as follows: 'The court may correct an illegal sentence *at any time*.' " *Andrews v. United States*, 373 U.S. 334, 337 n.4 (1963). [Emphasis added.] Rhode Island's Rule 35 "is essentially the same as its federal counterpart," *State v. O'Rourke*, 463 A.2d at 1331, providing for correction of an illegal sentence "at any time."

Like other United States courts of appeals,[6] the First Circuit has acknowledged the literal effect of the rule in

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[6] *See, e.g., United States v. Rico*, 902 F.2d 1065, 1067 (2d Cir. 1990) ("As reflected in former Rule 35(a), under common law a district court was free at any time to correct sentences when the judgment was 'void,' because these sentences were invalid and not final dispositions"), *cert. denied sub nom. Baron v. United States*, 498 U.S. 943 (1990); *United States v. Guevremont*, 829 F.2d 423, 427 (3d Cir. 1987) (reduced sentence was illegal and "may be corrected by the district court at any time"); *Safrit v. Garrison*, 623 F.2d 330, 332 (4th Cir. 1980) (citing *Breest*: "It is clear, of course, that a void or illegal sentence may be corrected, even though the correction may result in an increase"); *Llerena v. United States*, 508 F.2d 78, 81 (5th Cir. 1975) (when court discovers it has entered a sentence that does not conform to statute, it has a duty to correct the sentence even though service of sentence has begun); *United States v. Bentley*, 850 F.2d 327, 328 (7th Cir.) (nothing prevented district court from correcting illegal sentence under version of Rule 35(a) then in effect, by resentencing), *cert. denied*, 488 U.S. 970 (1988); *Burns v. United States*,

its prior decisions. *See, e.g., United States v. Ames*, 743 F.2d 46, 47 (1984) (per curiam) ("sentencing court may correct an 'illegal sentence' at any time"), *cert. denied*, 469 U.S. 1165 (1985); *United States v. De Los Santos-Himitola*, 924 F.2d 380, 382 (1991) (applicable version of Rule 35 empowered district court " 'at any time' to correct illegalities in sentences" for offenses committed during covered period); *United States v. Bynoe*, 562 F.2d 126, 129 (1977) ("A court may *always* correct an illegal sentence" [emphasis added]); *United States v. Becker*, 536 F.2d 471, 472 (1976) ("an 'illegal sentence' is correctable by a court 'at any time' ").

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552 F.2d 828, 831 (8th Cir. 1977) (when sentence does not conform to statute, "it is a nullity, and, as such, may be corrected at any time" in such case, "the district court has the duty to set aside what it had no authority to do and to correct the sentence so as to comply with the statute, even though service of the sentence originally imposed has begun and the correct sentence is regarded to be more onerous"); *United States v. Lewis*, 862 F.2d 748, 750 (9th Cir. 1988) ("Under Rule 35, the district court can 'correct an illegal sentence at any time.' "), *cert. denied*, 489 U.S. 1032 (1989); *Laycock v. State of New Mexico*, 880 F.2d 1184, 1188 (10th Cir. 1989) (amending sentence to conform to statutory requirement proper under state law); *United States v. Adair*, 826 F.2d 1040, 1041 (11th Cir. 1987) (per curiam) (sentence illegally reduced under initial Rule 35 motion properly corrected on revocation of probation); *United States v. Fogel*, 829 F.2d 77, 90 (D.C. Cir. 1987) (on discovering defect, court was free to correct sentence to extent necessary to bring the sentence into compliance with statute). *See also McNutt v. Schneckloth*, 241 F.2d 128, 129 (9th Cir. 1957) (per curiam) (agreeing with state supreme court "that when a sentence has been imposed for which there is no authority in law, the trial court has the power and the duty to expunge the void sentence and pronounce legal sentence, whenever the defect is discovered."); Annot., 28 A.L.R.4th 147-74 (1984 & Supp.).

In holding otherwise in this case, *DeWitt v. Ventetoulo*, 6 F.3d 32, the First Circuit has chosen to disregard Rhode Island's statute and rule and to pronounce instead that Rhode Island could not constitutionally correct its illegal sentence under its rule permitting correction at any time, because: (1) the State "took no appeal from" the 1981 decision reducing DeWitt's life sentence, *id.* at 35; (2) "there is no sign that Rhode Island had undertaken any wide-scale program to identify and resentence those whose earlier sentences were suspended in violation of *O'Rourke*", *id.*; and (3) the prisoner in this case "was actually released" and "remained free" for seven months, until his rearrest, before the suspension was recognized to be void and was vacated. *Id.* Though the court acknowledges "a number of cases including *Breest* itself" where a corrected sentence has "been upheld against constitutional or other challenges," *id.* at 34 & n.3, and though it concedes that, "in principle, there is no difference between such cases and a case like this one in which a sentence is reduced and later, finding the reduction to be unlawful, the court reinstates the original sentence", *id.*, the First Circuit pronounces that the correction in DeWitt's case "is so unfair that it must be deemed inconsistent with fundamental notions of fairness embodied in the Due Process Clause." *Id.* at 35.

While a few courts, state and federal, have questioned, with the First Circuit, whether it "might" not be "fundamentally unfair, and thus violative of due process" in some circumstances, *Breest*, 579 F.2d at 101, for a court to alter the status of a prisoner, *see United States v. Lundien*, 769 F.2d 981, 987 (4th Cir. 1985); *United States v. Rico*, 902 F.2d 1065, 1068 (2d Cir. 1990); *United States v. Ortega*,

859 F.2d 327, 335 (5th Cir. 1988); *United States v. Villano*, 816 F.2d 1448, 1459 (10th Cir. 1987) (Logan, J., concurring); *State v. Delmondo*, 67 Haw. 531, 533, 696 P.2d 344, 346 (1985); and *State v. Acuna*, 103 N.M. 279, 281, 705 P.2d 685, 687 (1985), *cited in DeWitt v. Ventetoulo*, 803 F.Supp. at 583; *see also United States v. Arrellano-Rios*, 799 F.2d 520, 525 n.3 (9th Cir. 1986) ("We note that courts have stated that enhancement of a sentence after the defendant's expectations in its length have 'crystallized' might be a denial of due process."), in none of these cases has a court overturned the reinstatement of an original, legal, sentence, on the ground that a prisoner had a due process right to rely on the subsequent, void, reduction.

Courts considering due process in the context of a change of status after passage of time have tended to look for waiver on the part of the government that would bar resumption of custody. For example, in *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967), habeas corpus was granted after the Court of Appeals found "more than 28 years of inaction on the part of the State of Texas relative to the unexpired term" of a defendant extradited to Louisiana and released without a Texas detainer, who remained at large from 1944 until 1960 when he was convicted in a Tennessee federal court and transferred to Texas for trial of a new felony. *Id.* at 1004. The court found Texas's "lack of interest" in Shields for 28 years "equivalent to a pardon or commutation of his sentence and a waiver of jurisdiction." *Id.* at 1006. It held Texas therefore "lacked authority to require Shields to complete service of the sentences under the old 1933 convictions, which action constituted a denial of due process under the Fourteenth Amendment to the United States Constitution." *Id.*

Lanier v. Williams, 361 F.Supp. 944 (D.N.C. 1973), involved a prisoner mistakenly released in 1967, *id.* at 948, who remained free and in contact with the local sheriff for nearly five years before being returned to custody to complete service of sentences imposed in 1964, *id.* at 946. In granting his petition for habeas corpus, the District Court remarked that "[d]iligent research" had "yielded scant authorities on the issues presented", *id.* at 947, but adopted "the waiver theory" of *Shields v. Beto* as consistent with "the principle that a prisoner cannot be required to serve his sentence in installments." *Id.* Said the court:

> Once the state, through acts or omissions of its officials, has led a person, through no fault of his own, to believe that he is free of a prison sentence, and makes no attempt for a prolonged period of years to reacquire custody over him, that person should be able to rely on the state's action or inaction and assume that further service of the sentence will not be exacted of him. The state should not later be heard to assert a right of custody over the person whom it has so misled, and to permit the state to do so offends the Due Process Clause of the Constitution.

Id.

Lanier was relied on in *Bonner v. Brock*, 610 P.2d 265, 267-68 (Okl.Cr. 1980), where "five years passed without the State's showing any interest" in enforcing a three-year sentence that the prisoner believed to have been concluded pursuant to agreement with the district attorney that a successor sought to nullify. *Id.* at 267. The court concluded, "To find that the three year prison sentence

should be administered at this late date offends notions of fundamental fairness and due process." *Id.*

Courts following that analysis in other cases have reached a contrary conclusion, depending on the facts. In *Clifton v. Beto*, 298 F.Supp. 1384 (D.Tex. 1968), for example, the district court distinguished *Shields* to hold that although Texas, which in 1946 conditionally pardoned defendant convicted in 1931 and 1932, had made no effort to place a detainer against him on being notified in 1947 that he was to begin serving a federal sentence in Arkansas, its inaction did not constitute a commutation of sentence or waiver of jurisdiction, and did not render its insistence in 1964 that he serve the remainder of his 1932 and 1933 sentences violative of due process. 298 F.Supp. at 1388. In affirming, 411 F.2d 1226, 1226 (5th Cir. 1969) (per curiam), the Court of Appeals found the *Clifton* facts "materially different" from those of *Shields*, noting: "Texas did not surrender [Clifton] to another jurisdiction and thereafter 'lose interest in him'. To the contrary, [Clifton] violated his Texas parole. . . . Thus he, not Texas, was the efficient, moving cause of the delay now sought to be invoked." *Id. See also Sterling v. Maggio*, 505 F.Supp. 1111, 1113 (D.La. 1981) (mem.) (where prisoner was mistakenly released and state regained custody less than 18 months later, state did not waive jurisdiction nor show such a lack of interest that it would be inconsistent with fundamental principles of liberty and justice to require him to serve sentence); *People v. Cavelli*, 50 N.Y.2d 919, 921, 431 N.Y.S.2d 450, 451, 409 N.E.2d 924, 925 (1980) (mem.) (while court in certain cases may, as a matter of due process, lose jurisdiction over a defendant either because his sentence has been interrupted for a lengthy

period or because he has otherwise been subjected to significant prejudice, it was not unreasonable as a matter of law to require a defendant inadvertently released to serve the balance of one-year sentence); *State v. Sheehy*, 115 N.H. 175, 337 A.2d 348 (1975) (while State cannot, consistent with fundamental principles of justice protected by due process clause of the fourteenth amendment, compel a parolee to serve out his sentence after the State has manifested a gross disinterest in him, defendant paroled in 1960 with express awareness that parole would not terminate until 1985 could be required to serve 1945 sentence where facts surrounding parole and subsequent arrests indicated New Hampshire maintained constant interest).

The District Court in this case, as the First Circuit court recognized, 6 F.3d at 34, "relied directly upon the Due Process Clause as construed by this Court in *Breest v. Helgemoe* [citations omitted]." "In *Breest*," the court recalled, 6 F.3d at 35, "we said that notions of fundamental fairness do place some temporal limit on later increases in sentence, [citation omitted,] and the Fourth Circuit, in *Lundien*, has endorsed this view." *Id.*

The State submits the First Circuit has erred in this case: (1) in viewing reinstatement of the original sentence, after a void reduction, as a "later increase[] in sentence"; (2) in interpreting due process in these circumstances to bar vacatur of the nullity; and (3) in creating conflict among the Circuits, based solely on its own decision in *Breest* and its view of the Fourth Circuit decision in *Lundien*, 769 F.2d at 987, by imposing a "temporal limit" in this case on the power of a court to vacate a void or illegal sentence.

B. IN OVERTURNING THE IMPOSITION OF A LEGAL STATE SENTENCE THE COURT OF APPEALS HAS TRANSGRESSED THE BOUNDS OF PROPER JURISDICTION UNDER § 2254.

As this Court has stated, "The role of habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Brecht v. Abrahamson*, ___ U.S. ___, ___, 113 S.Ct. 1710, 1719 (1993). As it has also observed, "[A] state rule of law 'does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' " *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) (quoting "the remark of Justice Cardozo in *Snyder v. Massachusetts*," 291 U.S. 97, 105 (1934)).

With its decision in this case, the First Circuit has overturned a life sentence legally imposed by the State of Rhode Island and affirmed by the State's highest court, and has ordered instead, that the prisoner serve a fifteen-year sentence the Rhode Island Supreme Court has declared a nullity because of its imposition in violation of state law.

The First Circuit has decreed this, notwithstanding a state procedural rule permitting the correction of an illegal sentence "at any time", because it has concluded that the correction was not timely for purposes of the Due Process Clause of the United States Constitution.

In reaching this conclusion, the court has disregarded both the factual findings of the Supreme Court of Rhode Island, and the stated intent of the sentencing judge, and

substituted its own view that the prisoner's early release on parole and remaining at large for seven months before his rearrest worked him such prejudice that vacatur of his illegal suspension was fundamentally unfair.

While it candidly admits to reaching this conclusion "with diffidence because federal judges have no monopoly on wisdom in deciding what is unfair," 6 F.3d at 36, and though it acknowledges that no case brought to its attention has reached the same result, *id.* at 34-36 & nn.3 & 5, the court expresses "confiden[ce] that this case is very unusual and that our decision imposes no serious constraint on state authorities who, unlike federal judges, have the direct responsibility for the law-enforcement and prosecutorial tasks at hand." *Id.* at 36.

The jurisdiction of a federal court to countermand a State in matters of state punishment is not broad enough under 28 U.S.C. § 2254 to countenance such a result.

This Court has " 'defined the category of infractions that violate "fundamental fairness" very narrowly.' " *Estelle v. McGuire*, ___ U.S. ___, ___, 112 S.Ct. 475, 482 (1991) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). It has also held that, " 'Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.' " *Id.*

If this Court could hold, in *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980), that a federal defendant whose sentence is contested by the government under 18 U.S.C. § 3576, "of course, is charged with knowledge of the statute and its appeal provisions, and *has no expectation of finality* in his sentence until the appeal is concluded or the time to appeal has expired" [emphasis

added], then it is submitted the defendant in this case could not have had an expectation of finality in a sentence subject to correction "at any time" if illegal. *See United States v. Crawford*, 769 F.2d 253, 257 (5th Cir. 1985) ("While *DiFrancesco* did not involve correction of an illegal sentence within the meaning of Rule 35, its rationale, in the constitutional sense, is applicable here. *Defendant is charged with knowledge that his sentence, if illegally imposed, is subject to correction under Fed.R.Crim.P. 35(a).*" [Emphasis added.])

Clearly this was not the kind of "extreme case" the State "conceded at oral argument" would implicate the Due Process Clause, 6 F.3d at 34, as where a defendant released and allowed to remain at large for years with nothing but "gross disinterest" by the State was snatched back unexpectedly to serve an old sentence, *see Shields v. Beto*. Nor is it the kind of "exceptional circumstance[]" referred to by the court in *United States v. Guevremont*, 829 F.2d 423, 429 n.8 (3d Cir. 1987), "as where the defendant has already completed service of the illegal sentence." The defendant in this case was still under the active supervision of the Parole Board and was serving twenty years' probation imposed by the sentencing judge at the time of reduction, as the First Circuit court acknowledged. 6 F.3d at 36-37. Nothing in the record supports the court's remark that "DeWitt appears to have been singled out primarily to relieve the state of the trouble of conducting a parole revocation hearing." *Id.* at 35. On the contrary, revocation of parole in Rhode Island is not the province of the courts, but solely of the Parole Board, which did in fact revoke DeWitt's parole. For the First Circuit to hold that the superior court had no power to

vacate its own illegal fifteen-year sentence, leaving in place the original, valid, life sentence – an action the Court of Appeals calls "a judgment unlawfully reimposed on DeWitt in violation of the Constitution", *id.* at 37 – is clearly to transgress the bounds of jurisdiction granted it under § 2254. *See Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (Where state supreme court construed its statutes and recognized intent of its legislature, Court is "bound to accept" state court's "construction of that State's statutes." "Legislatures, not courts, prescribe the scope of punishments." [Footnote omitted.]). *See also United States ex rel. Hanrahan v. Bosse*, 547 F.Supp. 718, 720-21 (D.Ill. 1982) (where habeas corpus petitioner had moved state trial court to reduce sentence under state statute which allowed reduction or modification not later than 30 days after sentence imposed, and state supreme court held circuit court had power to reduce sentence only within 30 days after actual imposition, which was not stayed by appeal, petitioner could not escape limitation on federal court's authority to interpret state law by claiming due process violation).

CONCLUSION

The decision of the First Circuit Court of Appeals overrules the State's court of last resort and conflicts with prior decisions of this Court and other Circuits in establishing a "temporal limit" for the correction of an illegal sentence, based on an unsupported interpretation of the Due Process Clause as it applies to the States.

The Petition for Certiorari should be granted to restore the State's legal sentence, to resolve this apparent conflict, and to clarify what latitude is extended to federal courts in reviewing matters of state sentencing and procedure by way of habeas corpus relief under 28 U.S.C. § 2254.

Respectfully submitted,

JEFFREY B. PINE
Attorney General of the
State of Rhode Island

ANNIE GOLDBERG
Assistant Attorney General
Appellate Division
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400, x.2289

Attorneys for Petitioner

APPENDIX A

Fred DeWITT, Petitioner, Appellee,

v.

Donald VENTETOULO, Acting Director, Adult Correctional Institution, et al., Respondents, Appellees.

Attorney General of Rhode Island, Appellant.

No. 93-1002.

United States Court of Appeals, First Circuit.

Heard June 11, 1993.

Decided Oct. 6, 1993.

After conviction for robbery, assault with intent to murder, and arson was affirmed on appeal, 429 A.2d 628, state court revoked parole and reimposed original life sentence on ground that early relief suspending all but 15 years of his life sentence was mistaken, 657 A.2d 845. Petition was then filed for writ of habeas corpus. The United States District Court for the District of Rhode Island, Francis J. Boyle, Chief Judge, 803 F.Supp. 580, granted writ. Appeal was taken. The Court of Appeals, Boudin, Circuit Judge, held that petitioner's due process rights were violated when, six years after suspending all but 15 years of life sentence, state court reimposed original life sentence on ground that earlier relief was mistaken.

Affirmed.

Annie Goldberg, Asst. Atty. Gen., Appellate Div. with whom Jeffrey B. Pine, Atty. Gen., was on brief for appellant.

David A. Schechter with whom Margaret-Mary Hovarth was on brief, for appellee.

Before SELYA, CYR and BOUDIN, Circuit Judges.

BOUDIN, Circuit Judge.

The district court granted a writ of habeas corpus, which it stayed pending this appeal, ordering the release from state imprisonment of Fred E. DeWitt, 603 F.Supp. 580. The basis for the writ was the district court's decision that Rhode Island had acted unconstitutionally in increasing DeWitt's sentence and reimprisoned him after his release on parole. We agree with the district court's decision and affirm.

I.

The constitutional issue in this case arises under the Due Process Clause of the Fourteenth Amendment. In some areas, such as search and seizure, due process has been reduced to detailed and nearly mechanical rules. In other areas, the precepts are very general, and everything turns upon the circumstances. The issue here is of this latter type, and so we begin with a complete account of the procedural history of this case.

On March 17, 1978, after a trial by jury, DeWitt was convicted in Rhode Island Superior Court of robbery, assault with intent to murder, and arson. These menacing labels do not convey the full measure of De Witt's evil conduct. According to testimony given by the victim, a

woman then about 67, DeWitt broke into her home while carrying a knife, struck her with his hand and with a hammer, engaged in one brutal act after another, and then bound and gagged the victim and set fire to her apartment.

The superior court imposed on DeWitt a life sentence which meant under Rhode Island law that parole was possible but not for a minimum of 10 years. DeWitt began serving his sentence in 1978 and in 1980 his conviction was affirmed by the Rhode Island Supreme Court. *State v. DeWitt*, 423 A.2d 828 (R.I.1980). Then, in the following year. DeWitt came to the aid of a prison guard who was being assaulted by an inmate, and DeWitt later testified for the state in the prosecution of the inmate. There is some suggestion that DeWitt, not surprisingly, may have suffered at the hands of other inmates on account of his rescue efforts.

In recognition of these efforts, the superior court on June 25, 1981, held a hearing and entered an order suspending all but 15 years of DeWitt's life sentence and providing that he would be placed on probation for 20 years from the time of his future release, whenever that occurred.[1] This shortened the minimum period before DeWitt could seek parole, but six years remained before DeWitt's parole application was granted. In the meantime, in mid-1983, the Rhode Island Supreme Court

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[1] This lessened sentence was imposed under Rule 35 of the Rhode Island Rules of Criminal Procedure which permitted the court to correct illegal sentences at any time and to reduce sentences within 120 days of either conviction or receipt of mandate affirming the conviction.

decided *State v. O'Rourke*, 463 A.2d 1328 (R.I.1983), holding that the superior court could not "suspend" a sentence once a defendant had begun to serve it.[2]

Between 1983 and 1987, the state apparently made no effort to have the superior court undo its partial suspension of DeWitt's life sentence. Instead DeWitt continued to serve his sentence, pursued education and training courses in prison, and applied several times for parole. Finally, in January 1987, DeWitt was granted parole and released from prison. We are told by the state that this occurred about 16 months before the earliest date on which DeWitt would have been eligible for parole if held under a life sentence. Thus, despite *O'Rourke* the prison and parole authorities continued to treat DeWitt as if the order suspending his sentence in part was still in force.

During the eight months following his release in January 1987, DeWitt obtained work, beginning a painting business and then a siding business. He resumed his relationship with family members and his girlfriend. He also rented an apartment but moved out after a disagreement, DeWitt believing that the landlord was billing the entire building's utilities to DeWitt's meter. It was this latter occurrence that began the chain of events leading to this appeal. According to DeWitt, he later returned to his old neighborhood to visit a friend, was invited in by his

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[2] The court ruled that a state statute, R.I.Gen. Laws § 12-19-10, forbad such suspensions and had not been modified in this regard by Rule 35. *O'Rourke*, 463 A.2d at 1331. It appears that the superior court judge in DeWitt's case was not alone in assuming, prior to *O'Rourke*, that a suspension power did exist under Rule 35.

former landlord, and was then attacked by the allegedly drunken landlord and his wife with knives. In the turmoil, the landlord and his wife were injured.

The landlord's version clearly differed, for the state began criminal proceedings against DeWitt based on the incident. The state also took steps to re-imprison DeWitt based on his 1978 conviction, but it did not use the customary method of seeking to revoke his parole for violation of the good behavior conditions. Instead, after a hearing on September 21, 1987, the superior court vacated its earlier June 1981 order that had suspended in part DeWitt's original life sentence; the court's ruling was that *O'Rourke* showed that the original suspension order had been improper. DeWitt is currently being held in prison pursuant to that reimposed life sentence.

The rest of the procedural story can be briefly told. At some point after September 1987 DeWitt was tried on state charges growing out of the knife incident with his landlord, and DeWitt was acquitted by the jury. In January 1988, DeWitt made a new motion under Rule 35 to alter his life sentence. The superior court denied the motion as untimely. An appeal followed, challenging both the reimposition of the life sentence and the denial of the new Rule 35 motion. The Rhode Island Supreme Court rejected the first challenge, including DeWitt's express claim that the reimposed sentence violated the Due Process Clause. *State v. DeWitt*, 657 A.2d 845 (R.I.1989). The court ruled that the Rule 35 claim was timely, but, on remand, the superior court denied the Rule 35 motion on the merits and no appeal was taken.

On December 11, 1990, DeWitt filed his habeas petition in the district court. The district court conducted an evidentiary hearing, adducing many of the facts set forth above. On October 20, 1992, the district court issued a memorandum and order granting the habeas petition. The district court's judgment, which is stayed pending this appeal, was entered on December 10, 1992.

Judge Boyle's decision granting DeWitt's habeas petition relied directly upon the Due Process Clause as construed by this court in *Breest v. Helgemos*, 579 F.2d 95 (1st Cir.), *cert. denied*, 439 U.S. 933, 99 S.Ct. 327, 58 L.Ed.2d 229 (1978). There, this court stated that "the power of a sentencing court to correct [upward] even a statutorily invalid sentence must be subject to some temporal limit" and that in some circumstances such a correction "might be fundamentally unfair, and thus violative of due process. . . . " *Id.* at 101. After a careful analyses of the present facts, Judge Boyle concluded that fundamental unfairness did exist here, especially given the state's failure to take any steps to reimpose the life sentence in the four years after *O'Rourke* and prior to DeWitt's release. The state then brought this appeal.

II.

There is no surer recipe for confusion than to answer two different questions at the same time. Thus, in assessing DeWitt's due process claim, we put to one side for the moment the fact that DeWitt may have violated the good behavior conditions attached to his parole. Instead, we ask whether – assuming *arguendo* that no parole violation occurred – the superior court was nevertheless entitled

six years after the event to correct its earlier mistaken grant of Rule 35 relief and to reimpose the original life sentence.

The Constitution contains no general rule that prohibits a court from increasing an earlier sentence where the court finds that it was erroneous and that a higher sentence was required by law. On the contrary, this has occurred, and been upheld against constitutional or other challenges, in a number of cases included *Breest* itself.[3] And in principal, there is no difference between such cases and a case like this one in which a sentence is reduced and later, finding the reduction to be unlawful, the court reinstates the original sentence.

But in law what is true for the usual case is often not true in the extreme case. Even the state conceded at oral argument that due process must impose some outer limit on the power to revise sentences upward after the fact. We are concerned here not with the substantive grounds of a state's decision to reduce or increase a sentence, but rather with the inherently procedural issue of whether

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[3] *See, e.g., United States v. DiFrancesco*, 449 U.S. 117, 133-34, 101 S.Ct. 420, 435-36, 66 L.Ed.2d 328 (1980). *United States v. Rico*, 902 F.2d 1065, 1068-69 (2d Cir.), *cert. denied*, 492 U.S. 943, 111 S.Ct. 352, 112 L.Ed.2d 316 (1990). *United States v. Cook*, 890 F.2d 672, 673 (4th Cir. 1989). *Lintefield v. Caton*, 856 F.2d 344, 348-49 (1st Cir. 1988). *United States v. Osage*, 859 F.2d 327, 334 (5th Cir. 1988), *cert. denied*, 459 U.S. 1027, 109 S.Ct. 1157, 103 L.Ed.2d 216 (1989). *United States v. Villano*, 816 F.2d 1446, 1458 (10th Cir. 1987). *Lerner v. Giff*, 751 F.2d 450, 458 (1st Cir.), *cert. denied*, 472 U.S. 1010, 105 S.Ct. 2709, 86 L.Ed.2d 724 (1985). *United States v. Lundien*, 769 F.2d 981, 986-87 (4th Cir. 1985), *cert. denied*, 474 U.S. 1064, 106 S.Ct. 815, 88 L.Ed.2d 789 (1986). *Burns v. United States*, 552 F.2d 828, 831 (5th Cir. 1977).

and when a state can reopen a matter after a final unappealed decision, after a substantial lapse in time during which the state had actual knowledge of the error, and after a significant change in circumstances. In short, the question we face is one of *process*.

In *Breest* we said that notions of fundamental fairness do place some temporal limit on later increases in sentence, 579 F.2d at 101, and the Fourth Circuit, in *Lundien*, has endorsed this view. 769 F.2d at 987. *See also Villano*, 816 F.2d at 1458 (Logan, J. concurring). It is quite true that the cases following *Breest* generally found, as did *Breest* itself, that the particular upward revision in question did not violate due process. A convicted defendant does not automatically acquire a vested interest in a mistakenly low sentence. Only in the extreme case can a court properly say that the later upward revision of a sentence, made to correct an earlier mistake, is so unfair that it must be deemed inconsistent with fundamental notions of fairness embodied in the Due Process Clause. *Accord Lundien*, 769 F.2d at 987.

In our view, there is no single touchstone for making this judgment, nor any multi-part formula. Rather, drawing on considerations mentioned by cases like *Breest* and suggested by common sense, we think that attention must be given – our list is not exclusive – to the lapse of time between the mistake and the attempted increase in sentence, to whether or not the defendant contributed to the mistake and the reasonableness of his intervening expectations, to the prejudice worked by a later change, and to the diligence exercised by the state in seeking the change. To be sure, doctrine should evolve toward yardsticks and formulas, making law more predictable and reducing the

need for ad hoc decisions by judges. But that is the end point of the journey, and we are at the beginning.

We start with the central and singular fact that the state, which was represented at the hearing in which DeWitt's sentence was suspended in 1983, took no appeal from that decision, even though an appeal is the ordinary and expected way in which errors are to be corrected. The state had a second chance also to correct the error in 1983 after the Rhode Island Supreme Court held in *O'Rourke* that the suspension power could not be used after a prisoner had begun to serve his sentence; once again, the state made no effort (so far as the record reveals) to apply to the trial court to undo the suspension of DeWitt's sentence error. The process that DeWitt received, therefore, begins with a remarkable double default by the state. It is not a matter of the state being estopped; rather, in deciding what is fundamentally unfair we cannot ignore the fact that with due diligence the state could have challenged the suspension long before DeWitt's release.

Following the state's double default, circumstances changed substantially. In contrast to cases like *Breest*, DeWitt not only continued for a number of years in prison reasonably believing that his sentence had been reduced, but he was actually released. He remained free from January 1987 to September 1987 and laid down new roots in society, acquiring a job and reestablishing family ties. Only at this point, did the superior court correct its original mistake and reimprison him. The lengthy delay and change of circumstances are not decisive but they

contribute to the judgment whether due process was afforded by the belated reopening.

Finally, due process requires a weighing not only of the defendant's interest in finality, but of the state's interest in correcting error. Yet there is no sign that Rhode Island has undertaken any wide-scale program to identify and resentence those whose earlier sentences were suspended in violation of *O'Rourke*. Rather, DeWitt appears to have been singled out primarily to relieve the state of the trouble of conducting a parole revocation hearing. The impression is hard to avoid that the resentencing here primarily serves only to skirt the minimal due process obligations that attach to parole revocations, that the state could conduct such a proceeding at minimal cost, and that the state's own self-proclaimed interest in vindicating *O'Rourke* is limited to this case.

As we have said, there are numerous cases allowing a sentence to be increased after it was initially imposed in error. In virtually all that we have discovered, there has been some distinguishing circumstance that separates that case from DeWitt's, for example, because (as is often true) the defendant was still in prison, or the interval between the original sentence and its correction was brief, or because the defendant almost certainly knew or should have known that an error had been made.[4]

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[4] *Compare Lerner*, 751 F.2d at 458 (mistake corrected after three years but while defendant still in prison); *Cook*, 890 F.2d at 674 (mistake corrected after three weeks while defendant awaiting a report date for community confinement), and *Rico*, 902 F.2d at 1068-69 mistake – of which defendant must have known – discovered three days after defendant erroneously sentenced to time served and released).

Conversely, we are completely satisfied, as *Breest* and *Lundieu* said in dicta, that due process must in principle impose an outer limit on the ability to correct a sentence after the event.

Thus we face here the familiar due process problem of deciding how much is too much. In concluding that DeWitt's case crosses the line, we have taken into account a range of considerations: the multi-year period between the suspension and the reimposition of sentence, the reasonableness of DeWitt's reliance, his release from prison and formation of new roots, the unusual tardiness of the state in failing to correct the error from 1983 onward, and the existence of an alternative parole revocation remedy. These elements cannot be calibrated precisely, nor can they be taken in isolation. The outcome here is the result of the combined weight of the elements.

We reach our conclusion with diffidence because federal judges have no monopoly on wisdom in deciding what is unfair, and even harsh decisions by state authorities usually raise no constitutional issue. But we are confident that this case is very unusual and that our decision imposes no serious constraint on state authorities who, unlike federal judges, have the direct responsibility for the law-enforcement and prosecutorial tasks at hand. In sum, this case is the very rare exception to the general rule that courts can, after sentence, revise sentences upward to correct errors.

III.

We turn now to Rhode Island's counter arguments and, in particular, to the issue we earlier reserved concerning DeWitt's supposed parole violation. The state has fought earnestly for its position that the district court erred in granting the writ, but in our view the arguments on which the state lays most stress are not very compelling.

The state argues broadly that the original suspension of DeWitt's life sentence was a matter of discretion, and the decision to parole him before the end of his new 15-year sentence was likewise discretionary. From these premises the state concludes that DeWitt cannot have an interest in remaining at large that is protectable under the Due Process Clause. But it is one thing to say that DeWitt could not have compelled the suspension of sentence or the grant of parole; it is quite another to ignore the reality that the discretion was exercised in his favor and the state is now trying to withdraw what it has bestowed.

Rhode Island is not required to give away its property but if it gave away its state house as a gift, it is unlikely it could get it back without paying just compensation to the new owner. More closely on point, the state is not obliged by the Constitution to parole its prisoners, but having done so, it is obliged to afford them due process – what process is due is another matter – when it revokes paroles. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The case relied upon by the state for its discretion argument, *Greenhots v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), involved the very different question

whether the state is obliged to provide due process in deciding *whether* to grant parole.

The state's main arguments in this case are narrower and center upon DeWitt's fight with his former landlord. DeWitt was warned, the state points out, that his parole could be revoked if he got himself into trouble. That he was acquitted by a jury of causing the trouble, says the state, means nothing; the burden of proof in that trial was beyond a reasonable doubt, while in parole revocation, state law requires only evidence that would "reasonably satisfy" the decision-maker that a violation occurred. *Walker v. Langlois*, 104 R.I. 274, 243 A.2d 733, 737 (1968). Quoting from DeWitt's own testimony about the incident, the state suggests that DeWitt's version of the struggle with the landlord is contradictory and improbable.

These arguments remind one of a boxer leading with his chin. No one doubts that the state could at the outset have conducted a proceeding to revoke DeWitt's parole. DeWitt's story that he was attacked without provocation by the landlord and his wife, both armed with knives, is one that any parole board lawyer might enjoy testing on cross-examination. The Constitution has not been read to require proof beyond a reasonable doubt in a parole revocation proceeding. *E.g., Whitehead v. U.S. Parole Commission*, 755 F.2d 1536, 1537 (11th Cir.1985). If the state found that DeWitt had misbehaved, it could have surely cancelled his parole.

But this is not what happened. There has been no official determination of wrongdoing by DeWitt, and he has not been returned to prison to serve a 15-year sentence. The state can hardly expect that this court will

determine, based on the state's selection of transcript excerpts, that DeWitt was at fault. It may well be that under Rhode Island law the state can still revoke DeWitt's parole on account of the knifing incident. We have no competence to revoke the parole, and no occasion to consider any federal claims that DeWitt might make against such a remedy.[5] But as matters now stand, DeWitt is being held pursuant to a judgment sentencing him to life imprisonment, a judgment unlawfully reimposed on DeWitt in violation of the Constitution.

In the concluding section of its brief, the state asserts in one sentence that DeWitt's claim in this court is foreclosed by his failure to appeal to the Rhode Island Supreme Court after the superior court on remand denied his new Rule 36 motion. When that motion was denied, DeWitt had already presented to the Rhode Island Supreme Court the due process claim on which we pass today, and that court had already rejected that claim on the merits. DeWitt had thus fully exhausted his state remedies to vindicate his due process claim, and the state's exhaustion objection is meritless.

Affirmed.

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[5] Possibly DeWitt would argue that due process precluded revoking his parole for misconduct after the jury acquittal. However, like most circuits, we have sustained the use of "acquitted conduct" to increase sentences under the Sentencing Guidelines, based on the same distinction as to burden of proof urged by Rhode Island in this case. *E.g., United States v. Moorsola*, 891 F.2d 13, 16-17 (1st Cir.1989).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 93-1002.

FRED DEWITT,
Petitioner, Appellee,

v.

DONALD VENTETOULO, ACTING DIRECTOR,
ADULT CORRECTIONAL INSTITUTION, ET. AL.,
Respondents, Appellees.

ATTORNEY GENERAL OF RHODE ISLAND,
Appellant.

Before
Breyer, *Chief Judge*,
Torruella, Selya, Cyr, Boudin and Stahl, *Circuit Judges*.

ORDER OF THE COURT
Entered: November 22, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court:

FRANCIS P. SCIGLIANO

Clerk

[cc:Mr. Schechter and Ms. Goldberg]